

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

LEVATOR DIXON,

Defendant-Appellant.

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UNPUBLISHED

October 26, 2001

No. 225040

Berrien Circuit Court

LC No. 99-402950-FH

Before: Neff, P.J., and Doctoroff and Wilder, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of voluntary manslaughter, MCL 750.321, and sentenced to 114 to 180 months' imprisonment. He appeals as of right. We affirm.

Defendant was charged with open murder following a violent altercation with the victim Robert Hudson. The two men were socializing in an alley with other people and got into an argument after Hudson accused defendant of having an affair with his wife. Defendant admitted to hitting Hudson with an attachment to a vacuum cleaner during the argument. After other people broke up the fight, both defendant and Hudson left the alley. They later returned and the argument resumed with Hudson threatening defendant. Hudson threw punches at defendant, and defendant responded by pulling out two knives and stabbing Hudson in the chest. It was undisputed that Hudson was unarmed and witnesses verified that defendant could have left the scene. Defendant claimed that he did not actually stab Hudson, but that Hudson ran into defendant's knives.

Defendant argues that he was deprived of his constitutional right to effective assistance of counsel because defense counsel failed to object to the introduction of improper other acts evidence or to move for a mistrial. Generally, a claim of ineffective assistance of counsel should be raised by a motion for a new trial or an evidentiary hearing. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000); *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Because defendant failed to develop a testimonial record supporting his claim that defense counsel was ineffective, the issue is "largely forfeited" and our review is limited to the existing record. *Snider, supra* at 423.

A successful claim of ineffective assistance of counsel requires a showing that "(1) the performance of counsel was below an objective standard of reasonableness under prevailing

professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *People v Nimeth*, 236 Mich App 616, 624-625; 601 NW2d 393 (1999), quoting *People v Plummer*, 229 Mich App 293, 307; 581 NW2d 753 (1998). Generally, "effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Noble*, 238 Mich App 647, 661-662; 608 NW2d 123 (1999).

Defendant claims that his counsel was ineffective for failing to object or seek a mistrial after a police detective testified that defendant's name came up in the criminal justice computer system under an alias and that police officers were familiar with defendant from an assault with his girlfriend. We agree with defendant that the testimony was inappropriate other acts evidence and should not have been admitted.

Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b)(1) if the evidence is "(1) offered for a proper purpose and not to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice [pursuant to] MRE 403." *People v Williams*, 240 Mich App 316, 322-323; 614 NW2d 647 (2000), quoting *People v Ho*, 231 Mich App 178, 185-186; 585 NW2d 357 (1998).

Here, the detective's testimony regarding the prior assault, alias, and defendant's criminal history was not relevant or sufficiently probative of any issue or fact of consequence. There is no question that the testimony was improper under MRE 404(b)(1). In addition, the prosecutor did not provide notice to defense counsel of the intention to admit other acts evidence as required by MRE 404(b)(2). Because the testimony had no proper purpose, it should not have been introduced.

Although we agree with defendant that the testimony at issue was inadmissible, we do not reach the conclusion that counsel's failure to object to the testimony fell below an objective standard of reasonableness. It is possible that counsel was fully aware of the inadmissibility of the evidence and its prejudicial nature, yet decided not to object because it was a passing remark that merely implied that defendant had a criminal history and raising an objection would serve no purpose other than to underscore that fact for the jury. See *People v Barker*, 161 Mich App 296, 304-305; 409 NW2d 813 (1987). Because there was no hearing on this issue pursuant to *Ginther, supra*, it is impossible to determine for certain why counsel did not object; however there is nothing in the existing record to counter the presumption that this was sound trial strategy. *People v Shively*, 230 Mich App 626, 628; 584 NW2d 740 (1998).

Further, counsel's failure to move for a mistrial was not objectively unreasonable because it is unlikely that the motion would have been granted. A trial court's decision to grant or deny a motion for a mistrial is discretionary. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). A mistrial should only be granted for an irregularity that is prejudicial to a defendant's rights and impairs his ability to get a fair trial. *Id.* An unresponsive, volunteered answer to a proper question does not warrant the granting of a mistrial. *Id.* In *Griffin*, we found that a trial court did not err in refusing to grant a mistrial after an unsolicited comment by a witness revealed that defendant had previously spent time in jail. *Id.* at 36-37.

Here, there is nothing to suggest that the prosecutor's question was improper or that the prosecutor was intentionally seeking to admit other acts evidence. Rather, the detective's response appears to be unsolicited and volunteered. In addition, the detective's comments, though clearly improper, were not so prejudicial that defendant would be unable to get a fair trial. Because it was unlikely that the trial court would have granted a motion for a mistrial, defense counsel was not objectively unreasonable in declining to advocate a meritless position. *Snider, supra* at 425.

Even if we were to conclude that defense counsel's failure to object or move for a mistrial was objectively unreasonable, defendant failed to demonstrate that, but for counsel's conduct, there was a reasonable likelihood that the outcome would have been different. *Nimeth, supra* at 624-625; *Snider, supra* at 423-424. As stated above, it cannot be assumed that the trial court would have granted defendant's motion for a mistrial. In fact, a mistrial was not warranted under the circumstances.

Further, had defense counsel objected and requested a cautionary instruction, there is no reason to believe that the jury would not have reached the same conclusion that defendant was guilty of voluntary manslaughter. In order to convict defendant of voluntary manslaughter, the prosecutor had to admit sufficient evidence to prove beyond a reasonable doubt that (1) defendant killed in the heat of passion, (2) the passion was caused by an adequate provocation, and (3) there was no lapse of time during which a reasonable person could control his passions. *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998).

Here, there was more than adequate evidence from which the jury could conclude that defendant killed Hudson in the heat of passion after Hudson provoked him. It was undisputed that defendant and Hudson were engaged in a violent argument after Hudson accused defendant of having an affair with his wife. It was equally certain that Hudson threatened and struck defendant. Further, there was testimony that supported the finding that defendant stabbed Hudson, as opposed to defendant's theory that Hudson ran into defendant's knives. Finally, it cannot be reasonably argued that the introduction of evidence of defendant's past assaultive behavior necessarily caused the jury to reject defendant's theory of self-defense. Even in the absence of the improper other acts evidence, the jury's conclusion that defendant did not act in self-defense was supported by evidence that Hudson was unarmed and defendant had the opportunity to retreat.

Affirmed.

/s/ Janet T. Neff  
/s/ Martin M. Doctoroff  
/s/ Kurtis T. Wilder